IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

AT&T WIRELESS SERVICES, INC.	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 03C-12-232 WCC
	)	
	)	
FEDERAL INSURANCE COMPANY; NATIONAL UNION INSURANCE OF PITTSBURGH, PA; ST. PAUL MERCURY INSURANCE COMPANY; AND CERTAIN UNDERWRITERS OF LLOYD'S, LONDON, AND CERTAIN LONDON MARKET COMPANIES,	)	
	)	
Defendants.	)	

Submitted: April 23, 2007
Decided: June 25, 2007

MEMORANDUM OPINION

On Defendant Federal Insurance Company's Motion for Partial Summary Judgment. GRANTED.

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CARPENTER, J.

INTRODUCTION

Before this Court is Federal Insurance Company's ("Federal") Motion for Partial Summary Judgment (the "Motion"). Upon review of the record and briefs filed in this matter, the Motion is hereby GRANTED.

FACTUAL BACKGROUND[1]

On February 15, 2002, TeleCorp PSC, Inc. ("TeleCorp") merged with AT&T Wireless Services, Inc. ("AWS"). Following the merger, TeleCorp shareholders filed a derivative action in the Delaware Court of Chancery alleging breach of fiduciary duties by the TeleCorp directors and officers ("Chancery Action") and by AWS due to its control over the "timing, structuring, disclosure and pricing of the merger."[2] The Court of Chancery approved a settlement of the shareholder action in which AWS agreed to pay $47.5 million in exchange for a dismissal of all remaining claims against the Chancery Action defendants (the "Shareholder Settlement"). AWS subsequently filed this litigation seeking reimbursement from TeleCorp's insurance carriers – Federal Insurance Company ("Federal"), National Union Fire Insurance Company of Pittsburgh, PA ("National Union") and St. Paul Mercury Insurance

[1] In the interest of brevity, only pertinent details have been included. For a more inclusive background of this case, see the Opinion issued by this Court on August 18, 2005.

[2] Am. Compl., *In re TeleCorp PCS, Inc., Shareholders Litig.* E-File 4284961 ¶184 (Del. Ch. C.A. No. 19260).

Company ("St. Paul") collectively, the "TeleCorp Insurers") for its appropriate share of the cost of the Shareholder Settlement and the fees associated with defending the Chancery Action. In addition, AWS sought reimbursement from its own primary insurer, Faraday Capital Limited ("Faraday"),[3] and its excess carrier, National Union (collectively, the "AWS Insurers"), relating to the service of AWS directors on the TeleCorp board as well as the company's own liability.

AWS filed its complaint on December 23, 2003, and the Court allowed AWS to file an amended complaint on September 28, 2004 to add claims of bad faith and an alleged violation of the Washington Consumer Protection Act ("Amended Complaint").[4] Shortly thereafter, the TeleCorp Insurers and the AWS Insurers each filed various motions to dismiss the Amended Complaint. In June of 2005, AWS attempted to voluntarily dismiss this case in preference for an identical action filed in the State of Washington. Both the AWS Insurers and TeleCorp Insurers contested the dismissal. In an opinion from this Court dated August 18, 2005, with respect to the AWS Insurers, the Court permitted the voluntarily dismissal of Faraday from this

[3] Faraday is referred to in the Amended Complaint as Certain Underwriters of Lloyd's, London and Certain London Market Companies.

[4] AWS is headquartered in Redmond, Washington.

action, but did not dismiss National Union.[5] As to the TeleCorp Insurers, the Court denied AWS's voluntary motion to dismiss.[6]

After having resolved the motions relating to the attempted voluntary dismissal of the defendants, the Court turned its attention to the motions to dismiss filed by the various insurance carriers. In an opinion issued by this Court on January 31, 2006, the Court granted the motion to dismiss filed by National Union as it relates to the AWS directors and officers.[7] In the same opinion, the Court granted in part and denied in part the motion to dismiss filed by the TeleCorp primary insurance carrier, Federal.[8] In turn, Federal has filed this Motion for Partial Summary Judgment (the "Motion") related to certain remaining claims against Federal:

1. Count VII (For an Order Finding the Insurers have Waived or are Estopped from Denying Coverage);

2. Count VIII (For an Order Estopping the TeleCorp Insurers and Certain Underwriters from Denying Coverage;

3. Count IX (Violations of Washington's Consumer Protection Act by TeleCorp Insurers and Certain Underwriters).[9]

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[5] *AT&T Wireless Serv. v. Federal Ins. Co.,* 2005 WL 2155695 (Del. Super. Ct.).

[6] *Id.*

[7] *AT&T Wireless Serv. v. Federal Ins. Co.,* 2006 WL 267135 (Del. Super. Ct.).

[8] *Id.*

[9] Am. Compl.

AWS has responded to the Motion, and argument before this Court was heard on April 23, 2007. Upon review of the pleadings and record on this matter, this is the Court's decision on the Motion.

STANDARD OF REVIEW

A resolution via summary judgment is encouraged by the Court to dispose of litigation economically and expeditiously, if possible.[10] Summary judgment is a tool used to remove any factually unsupported claims,[11] and is appropriate when the moving party has shown there are no genuine issues of material fact, and as a result, it is entitled to judgment as a matter of law.[12] In considering such a motion, the court must evaluate the facts in the light most favorable to the nonmoving party.[13] Summary judgment will not be granted when the record reasonably indicates that a

[10] *Bayside Health Assoc. v. Del. Ins. Co.*, 2006 WL 1148667 (Del. Super. Ct.), at *2 (citing *Davis v. Univ. of Del.*, 240 A.2d 583 (Del. 1968)).

[11] *Durig v. Woodbridge Bd. of Educ.,* 1992 WL 301983, at *7 (Del. Super. Ct.)(citations omitted)(Summary judgment is appropriate when "the nonmoving party bears the ultimate burden of proof and the moving party can illustrate a complete failure of proof regarding an essential element of the nonmovant's case.").

[12] *Moore v. Sizemore*, 405 A.2d 679, 680 (Del. 1979); *Schueler v. Martin*, 674 A.2d 882, 885 (Del. Super. Ct. 1996).

[13] *Pierce v. Int'l. Ins. Co. of Ill.*, 671 A.2d 1361, 1363 (Del. 1996).

material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of law to the circumstances.[14]

DISCUSSION

To uphold a claim under Counts VII, VIII and IX, the Plaintiff must first demonstrate Washington law is applicable to the dispute at hand. In making this determination, because Delaware is the forum state, Delaware's application of its choice of law standards applies, and the Court must determine which state has the most significant relationship to the dispute in question.[15] Federal argues Virginia law is applicable pursuant to the most significant relationship test of Section 188 of the Restatement of Conflicts conducted in contract disputes. Contrarily, AWS asserts Washington law is applicable through assessing the post-contract behavior of bad faith and applying the test set forth in Section 145(2) of the Restatement of Conflicts used in tort cases. Accordingly, it is important to first determine whether this dispute should be decided in the context of a contract or tort action. For the reasons set forth below, the Court finds this dispute must be resolved in a contractual setting.

First, it is significant that the dispute here resonates from a contract entered into between Federal and TeleCorp of which AWS was not a party. All of Federal's

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[14] *Ebersole v. Lowengrub*, 180 A.2d 467, 468-469 (Del. 1962).

[15] *Nat'l Acceptance Co. of Cal. v. Hurm,* 1989 WL 70953 (Del. Super. Ct.).

obligations stem from that contractual relationship in which the State of Washington had no connection. In other words, the State of Washington had no interest in protecting any bad faith conduct relating to the TeleCorp/Federal relationship since neither party was headquartered or incorporated in that state. TeleCorp was never a "citizen" of Washington for which its legislative protection would ever have been intended to be covered,[16] and any rights or obligations of Federal with respect to the payment of defense costs which are at issue here are governed by the terms and conditions of that contract.

Second, recently the Delaware courts have determined that the bifurcation between contract actions and tort actions to resolve disputes arising out of the parties' contractual relationship is commercially "non sensible." [17] Specifically, in *Millett v.*

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[16] TeleCorp directors and officers were protected by the Federal policy. Once AWS took over TeleCorp, those officers no longer existed as TeleCorp officers since the company dissolved. Thus, even if the Court determined AWS took over the rights of the insurance policy, it is still the case that the directors and officers were never citizens of Washington since they ceased to exist in that capacity once the merger was complete.

[17] *Travelers Indem. Co. v. Lake*, 594 A.2d 38, 47 (Del. 1991)("This brings the choice of law doctrines back into conformity by eliminating the often artificially contrived tort/contract distinctions that previously existed in our law."); *Millett v. Truelink, Inc.*, 2006 WL 2583100, *3 (D.Del.) (In assessing the applicability of a choice of law provision within the contract that did not cover tort claims, the court stated that "The Delaware courts, however, emphasizing the need for certainty in contractual rights and relations, have recently rejected plaintiffs' argument that different states' laws should be applied to claims sounding in tort and contractual claims.") (citing *Abry Partners V, L.P. v. F&W Acquisition, LLC*, 891 A.2d 1032 (Del. Ch. 2006)).

Truelink,[18] the Court determined that it is illogical to allow a contract dispute to fall under the law chosen within the contract, while at the same time allowing a consumer fraud claim to be governed by a different state simply because it was a tort action when it had no independent basis and only arose due to the contractual relationship of the parties. The *Millett* Court found that Delaware courts "emphasizing the need for certainty in contractual rights and relations, have recently rejected plaintiffs' argument that different states' laws should be applied to claims sounding in tort and contractual claims."[19]

In addressing a similar issue, Vice Chancellor Strine, in *Abry Partners V, L.P. v. F&W Acquisition, LLC* stated:

> To layer the tort law of one state on the contract law of another state compounds that complexity and makes the outcome of disputes less predictable, the type of eventuality that a sound commercial law should not seek to promote.[20]

The Court went on to cite the California opinion of *Nedlloyd Lines B.V. v. Superior Court* which states:

> We seriously doubt that any rational businessperson, attempting to provide by contract for an efficient and businesslike resolution of

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[18] 2006 WL 2583100.

[19] *Id.* at *3.

[20] *Abry Partners*, 891 A.2d at 1048.

> possible future disputes, would intend that the laws of multiple jurisdictions would apply to a single controversy having its origin in a single, contract-based relationship. Nor do we believe such a person would reasonably desire a protracted litigation battle concerning only the threshold question of what law was to be applied to which asserted claims or issues.[21]

The Court finds the rationale for the decisions in *Millett, Abry Partners* and *Nedlloyd Lines B.V.* persuasive, and while it recognizes that the insurance policy here does not have a choice of law provision, the same common sense and logic can be applied. The Court finds that the breach of contract claim and the bad faith claim are too intertwined and interdependent to be separated.

Lastly, the fallacy of the Plaintiff's argument is highlighted by the factual situation we have now in this case. Recently, AWS was purchased by Cingular Wireless headquartered in Georgia and the AWS operation has been moved to Texas.[22] Since the non-payment of benefits and the alleged bad faith of Federal continues, the logical questions would be whether the Court should now find that the state with the most significant relationship is Texas, and further, what interest does Washington have in protecting a "citizen" who has abandoned its state. In a highly mobile, sophisticated and complex commercial environment in which mergers and

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[21] 834 P.2d 1148, 1154 (Cal. 1992).

[22] Cingular Wireless is operating as AT&T Mobility, LLC, a wholly-owned subsidiary of AT&T, Inc., headquartered in Texas. *See* Connuck Aff., Ex. C, D, E.

acquisitions often occur, it causes unnecessary havoc and an uncertain business environment to piecemeal litigation claims to determine the law to apply at any given time to any given allegation.

The Plaintiff relies heavily upon the decision of *SnyderGeneral Corp. v. Great American Insurance Co.*[23] to support its position that a tort analysis to its bad faith claim is appropriate. In addition to being factually distinguishable[24] there appears to have been no apparent challenge to the magistrate's premise that a different standard should be applied to the bad faith claim nor any discussion of the interrelationship of the contract and the tort claim or the appropriateness of applying the laws of a different state to each particular claim. In addition, the findings of the magistrate were not reviewed or adopted by a U.S. District Court Judge, nor were they substantively discussed in the appeal of the matter to the Fifth Circuit.[25] It appears that the *SnyderGeneral* court, and perhaps the parties, simply accepted the distinction as gospel and plowed ahead without further analysis. Regardless, this Court does not

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[23] 928 F.Supp. 674 (N.D. Tex. 1996).

[24] The insured plant continued its operation after the merger, and for all practical purposes SnyderGeneral became the insured. The insurance company was aware of the change in ownership and location and could adjust its policy accordingly. However, here the insurable interest (the directors and officers of TeleCorp) ceased to exist once AWS took over TeleCorp, and therefore Federal had no reason to believe any additional state law would apply.

[25] *SnyderGeneral v. Continental Ins. Co.,* 133 F.3d 373 (5th Cir. 1998).

feel bound by the decision of a federal magistrate nor is it willing to ignore the contractual relationship which is at the crux of this dispute and but for which the bad faith claim would never exist.

As a result of the above, the Court will determine the most significant relationship test using the five factors set forth in Section 188 of the Restatement of Conflicts to determine which law to apply. Those factors are:

> (a) the place of contracting,
> (b) the place of negotiation of the contract,
> (c) the place of performance,
> (d) the location of the subject matter of the contract, and
> (e) the domicil, residence, nationality, place of incorporation and place of business of the parties.[26]

Each case must be decided on its particular facts and circumstances using these guidelines, and the Court should not simply sum up all of the factors and automatically apply the jurisdiction with the highest number of contacts.[27] With these fundamentals in place, the Court turns its attention to the enumerated factors as they relate to the facts of this case.

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[26]Restatement (Second) of Conflicts §188(2).

[27]*Travelers*, 594 A.2d at 38, 48 n.6.

(a) Place of Contracting

An Executive Protection Policy was issued by Federal to the directors and officers of TeleCorp to cover the time period of November 2000 through November 2001 (the "policy" or the "contract"),[28] and the policy was entered into in Virginia.[29] It is not clear where the parties negotiated the terms of the policy, but at the time the policy was executed, according to the declaration page, TeleCorp was located in Arlington, Virginia. In addition, three "Virginia Amendatory Endorsement" pages were included within the policy and signed on April 2, 2001, which reflects an acknowledgment by the contracting parties of the significance of Virginia law to the policy.[30] Thus, the Court finds the place of contracting to be Virginia.

(b) Place of Performance or Lack of Performance

AWS asserts it is the performance of Federal and how Federal handled AWS's claim for reimbursement that the Court should analyze, and that performance occurred out of the State of Washington once AWS bought TeleCorp. Since AWS was headquartered in Washington and all correspondence relating to AWS requesting reimbursement from Federal for the defense cost were sent from Washington, AWS

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[28]Compl., Ex. A.

[29]*Id.*

[30]*Id.*

asserts it is Washington law that should apply to a bad faith claim. However, Federal argues that it is the TeleCorp's directors and officers' actions that are in question, which is what the Chancery Action analyzed and what the policy provided protection for, and those actions took place in Virginia prior to the merger. However, as to this factor, the Court believes Delaware has the greatest interest.

It is the conduct of the TeleCorp directors and officers and the defense of that conduct that forms the obligation of Federal under the contract. The representation of these directors and officers occurred in Delaware and if there was a breach of Federal's duty under the contract, that failure to perform occurred within the context of the Delaware litigation. The performance that AWS is complaining about is the failure of Federal to pay for the cost of defending TeleCorp directors and officers in the Chancery Action. If Federal failed to perform, it was because it denied payment for the representation that had occurred in Delaware. Any correspondence and discussions that followed, regardless of where they occurred, were merely the aftermath of the breach that had already occurred. As such, if this was the most significant factor the Court would find the law of Delaware would apply.

(c) Location of Subject Matter of Contract

The subject matter of the policy is the conduct of the directors and officers of TeleCorp in relation to the agreement to merge with AWS on October 7, 2001, which was finalized in February 2002. While AWS's headquarters was located in Redmond,

Washington after the merger, it is the conduct of TeleCorp's directors and officers in Virginia that was the subject of dispute of the Chancery Action, and it is this Chancery Action which led to the request of reimbursement by AWS to Federal. Because the Chancery Action was against TeleCorp directors and officers and not AWS, it is the location of the TeleCorp directors and officers that is key, and that is Virginia.

(d) Domicile, Residence, Place of Incorporation and Place of Business

Federal is incorporated in Indiana, holds a principle place of business in New Jersey, and is licensed to do business in Delaware.[31] TeleCorp is a Delaware corporation and had its principle place of business in Virginia.[32] AWS was a Delaware corporation whose principle place of business was Washington at the time of the merger.[33] None of the parties have argued Indiana or New Jersey law should govern, nor have they argued strongly to apply Delaware law. However, the most significant factor in analyzing a choice of law question "[i]n a complex insurance case with multiple insurers and multiple risks is the principal place of business of the insured because it is 'the situs which link[s] all the parties together.'"[34] Typically the

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[31] Am. Compl.

[32] *Id.*

[33] *Id.*

[34] *Liggett Group, Inc. v. Affiliated FM Ins. Co.,* 788 A.2d 134, 138 (Del. Super. Ct. 2001).

principle place of the insured would be relatively clear, but this case proves to be more complicated.

At the time of contracting, TeleCorp's principle place of business was in Virginia.[35] In fact, the declaration page of the policy indicates TeleCorp's address as 1010 North Glebe Road in Arlington, Virginia.[36] However, on February 15, 2002 TeleCorp was purchased by AWS and its headquarters became the State of Washington. Then in October 2004, AWS was again purchased, this time by Cingular Wireless whose headquarters is in Georgia.[37] Currently, Cingular Wireless is known as AT&T Mobility, LLC and is headquartered in Texas.[38] Thus, since the policy was issued, there are four states through which TeleCorp, or its successors, has held a principle place of business.

Ironically, the one constant state throughout the mergers and the numerous companies is Delaware. According to the *Millet* Court, the incorporation of a company in Delaware is sufficient contact to allow Delaware law to govern.[39] However, the Court concludes based on the facts of this particular case, the state with

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[35]Compl. ¶7.

[36]Compl., Ex. A.

[37] Connuck Aff., Ex. C, D, E.

[38] *Id.*

[39]*Millett*, 2006 WL 2583100.

the most significant ties as to this factor is Virginia. While Washington may have an interest once TeleCorp was purchased by AWS, and while Delaware may have an interest as the place of incorporation, Virginia was the principle place of business of TeleCorp at the time the policy was issued, and it is the conduct of the director and officers of that company that is at issue.

(e) Conclusion

The Court points out again that it finds that the assertion of bad faith made by AWS cannot be separated from the policy itself or the breach of contract claim. The alleged failure of Federal to reimburse AWS for the conduct of the TeleCorp directors and officers stems directly from how the policy is interpreted, the language of the policy and the parties' intent. Whether AWS has the right to reimbursement and whether Federal acted reasonably in relation to AWS's claim can only be determined by first analyzing the terms, conditions and rights within the policy between the parties. While the complaint asserts a bad faith claim, it is first a contract dispute and the breach of the contract must be determined before one can decide if Federal acted in bad faith.

While this Court appreciates that there is a diversion of opinions on how to analyze contract and tort disputes arising out of a single event, this Court is unwilling to mindlessly separate the two claims and apply different state laws to each. As

previously indicated, the Delaware Courts have moved toward applying only one state law to contract and tort disputes that arise out of the same contractual relationship and that are controlled by the terms and conditions of that contract. As stated in *Abry*, the court's analysis of a choice of law issue should not be one "interpreted in a crabbed way that creates a commercially senseless bifurcation between pure contract claims and other claims that arise solely because of the nature of the relations between the parties created by contract."[40]

While the Court acknowledges that the lack of a choice of law provision within the policy at issue in these cases is a significant distinguishing factor, this cannot circumvent the fact that neither TeleCorp nor Federal would have any reason to think Washington law would apply. At the time of contracting either party could reasonably expect Delaware, Virginia, Indiana or New Jersey law to govern a contract dispute, but not Washington. While there is no chosen state law to apply within the policy, but for AWS purchasing TeleCorp, it appears either Virginia or Delaware law would most likely apply. Applying all the factors together, the most logical governing law for the breach of contract claim is the law of the Commonwealth of

[40] *Abry Partners,* 891 A.2d at 1047, citing *Weil v. Morgan Stanley DW Inc.*, 877 A.2d 1024, 1032-33 (Del. Ch. 2005).

Virginia, and since these claims are so interrelated, the Court will apply Virginia law to the bad faith claim as well.

In addition, if AWS was removed from the equation, that is if this Court looks at the picture as it was when the policy was in effect between TeleCorp and Federal, Washington has no interest in any claim or the contractual dispute. Washington became a possible locale by happenstance, and had AWS not purchased TeleCorp, that state would not be in the equation. There is simply no rational basis to allow Washington to now become the governing state over a dispute based in a contract issued to TeleCorp before the State of Washington was ever a thought.

Lastly, the Court must note that its ruling is based on the specific complex facts of this case. If the Court was to accept the rationale of AWS and applied Washington law, that same argument could now be used to suggest Georgia or Texas as the appropriate law to apply.[41] This has the potential of creating a choice of law nightmare either in this case or in cases that follow. To throw the possibility of Texas and Georgia into the mix is simply illogical, and clearly not contemplated by any party. Based on the circumstances and facts in this case, Virginia holds the most significant contacts and is the most appropriate governing law.

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[41] AWS has since been purchased by Cingular Wireless, which is based out of Georgia. AWS has become AT&T Mobility, LLC, which is based out of Texas.

CONCLUSION

Since the claims found in Counts VII, VIII and IX are unique to the Plaintiff's assertion that State of Washington law would apply and have no basis in the law of Virginia, Federal's motion for partial summary judgment is hereby GRANTED.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.